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IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

OCTOBER TERM, 1957.

No. 432.

JAMES G. EATON,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

From the Supreme Court of the State of Missouri,
Division No. 2.

RESPONDENT'S BRIEF AND ARGUMENT

In Opposition to Petitioner's Application for Writ of Certiorari.

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STATEMENT.

The petitioner herein was convicted of murder in the second degree for the killing of one Willie Van Ross, in the circuit court of Buchanan County, Missouri, May Term, 1945, and was sentenced to imprisonment for a term of

eighteen years. This judgment was affirmed June 10, 1946. State v. Eaton, 355 Mo. 164, 195 S. W. 2d 457.

Petitioner in May, 1947, subsequent to said conviction, and being incarcerated in the state penitentiary, and after the demise of the prosecuting attorney, Joseph Sherman, who participated in his trial in the circuit court of Buchanan County, Missouri, applied to the circuit court of Cole County, for a Writ of Habeas Corpus alleging: (1) That said conviction in the circuit court of Buchanan County, Missouri, was a result of perjured testimony given by one Albert "Cotton" Jones, which perjured testimony was knowingly used by the prosecuting attorney and: (2) From the prosecuting attorney suppressing evidence favorable to the accused and corroborative of his defense of self-defense. The charges alleged in said petition were thoroughly explored in a very extensive hearing in a finding adverse to petitioner and he was remanded to the custody of the warden.

Reference is made to the foregoing hearing on application for a Writ of Habeas Corpus for the reason the transcript of said hearing was marked as an exhibit and introduced in evidence in this case in the circuit court of Buchanan County, Missouri.

The proceeding complained of in this petition for Writ of Certiorari was instituted in the circuit court of Buchanan County, Missouri, by filing a motion in the nature of a Writ of Error Coram Nobis, said motion was amended by leave of court praying for the same relief, that said judgment and sentence be vacated and set aside on the same grounds alleged in the foregoing application for Writ of Habeas Corpus filed in the circuit court of Cole County, Missouri.

This motion was dismissed as an improper remedy without hearing any evidence; on appeal to the Supreme Court

of Missouri, that court held the allegations in said application entitled the petitioner to a hearing under the Supreme Court Rule 27.26, Vol. 42, V. A. M. S., and the cause was remanded for further proceedings not inconsistent with the opinion.

A hearing was held on the application and resulted in an order or judgment denying the motion and refusing to vacate the judgment and the petitioner appealed to the Supreme Court of the State of Missouri. The Supreme Court in State v. Eaton, Mo. Sup. 302 S. W. (2d) 866, affirmed the judgment denying the motion to vacate and set aside. The motion for rehearing was denied on June 10, 1957.

ARGUMENT.

I.

Respondent was not served with a copy of this petition for Writ of Certiorari.

So far as respondent is able to determine it was not served with a printed copy of this petition for a Writ of Certiorari within ten days after filing same in the Supreme Court as required by the rule of the Supreme Court.

The records of this Department fail to disclose that a copy of the Petition was ever served on it and the first copy of such petition was presented to this respondent was with a letter from the clerk of the Supreme Court of the United States under date of November 6, 1957, enclosing a copy of said petition and advising that said petition for Writ of Certiorari was filed in the Supreme Court of the United States on September 6, 1957, and that his records indicate respondent was served with a copy of same, and further advising that the court desires a response to said petition.

If it is true that no such service was had on respondent then said petitioner is not in court and the matter should be dismissed.

II.

The State did not suppress evidence.

This killing of Willie Van Ross occurred in the Harlem Club, 215 Francis Street, St. Joseph, Missouri. Said Club was operated by two colored men, Albert "Cotton" Jones and Gus Williams. The petitioner and companion, Harold Firpo Simmonds, are both white men. This killing followed after hours of drinking and gambling and an altercation by these two white men with a negro, Andrew

Hawkins, who had won at cards some $40 of their money. The proprietor was able to get the petitioner to take Simmonds and leave the premises. After visiting other places and drinking they returned to the Harlem Club. The decision of the Supreme Court of Missouri in **State v. Eaton,** Mo. Sup., 302 S. W. 2d 866, l. c. 869, sets forth in detail all of the facts introduced in evidence leading up to the homicide.

We assume the suppression of evidence charge is that the state failed to call Julia Hollins as a witness. There is some evidence that she had informed the prosecuting attorney that she saw a knife in the deceased's hand and, furthermore, she was endorsed as a state witness. However, she was not called to testify for the state.

Julia Hollins was an employee of said Club and a witness to the homicide. As stated hereinabove, she was endorsed as a witness on the information and she was also present at the trial and counsel for petitioner knew she was at the trial. **State v. Eaton,** supra, l. c. 873.

After the death of the prosecuting attorney she made an affidavit prepared by defendant's counsel stating that she was present at the shooting, that she observed a knife in the deceased's hand, which blade was open and protruding as he advanced toward said petitioner, and that she had so informed the prosecuting attorney. That the petitioner, or his counsel, were never informed as to what her testimony would be. She later made an affidavit on July 31, 1947, at the office of the prosecuting attorney wherein she states that she saw the knife when the deceased first pulled it on Firpo Simmonds in the barroom at said Club. That she was afraid and wanted nothing to do with it. The evidence discloses this was the first time she told anyone about seeing the knife except a statement to Waldo Goff, counsel for petitioner. That she was not threatened by anyone not to tell.

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At a subsequent hearing on motion for new trial in the Habeas Corpus proceeding January 10, 1948, she stated that she saw the knife in Van Ross's hand, furthermore, that she told the prosecuting attorney that she saw said knife in his hand but on cross-examination she testified as follows:

"'Q. Did you have any conversation with Mr. Sherman or Mr. Newcomer the morning after this crime occurred?

A. Yes, sir.

"'Q. Did you have any other conversation with him, and did you tell them at that time that you had seen the knife in the hands of Van Ross?

A. No, sir.

"'Q. You knew at that time that you thought you saw a knife?

A. I knew I had seen the knife.

"'Q. Did he ask you about any weapons?

A. No, sir. I went back upstairs. I didn't stay there very long.

"'Q. Did you have any reason for not telling him about the knife?

A. No. I didn't have any reason, other than I didn't want to be bothered or mixed up in it.'"

The court further said at l. c. 874:

"Mr. Newcomer specifically denied that he had any knowledge that Julia Hollins saw, or claimed to have seen the knife referred to in her affidavit and subsequent testimony.

"He testified that on the morning of the shooting, when he was at the Harlem Club interrogating prospective witnesses, Julia was there, and he asked her about the knife and 'she didn't know anything about it at all.'"

This court, in **State v. Eaton**, Mo. Sup., 302 S. W. 2d 866, l. c. 874, held that the State of Missouri does not follow

the rule that it is the duty of the prosecuting attorney to call everyone who was an eyewitness to the homicide whether it favors the commonwealth case or not. **State v. McAfee,** 148 Mo. 370, 50 S. W. 82, 84; **State v. Dixon**, Mo. Sup., 190 S. W. 290.

Assuming, for the sake of argument only, that Julia Hollins did inform the then prosecuting attorney of having seen a knife in deceased's hands at the time of the homicide, he was not absolutely bound to use such evidence in the trial of said petitioner if he did not believe it or he had other evidence clearly indicating to him that it was not the truth. All of these affidavits and testimony of seeing this knife in deceased's hand was never produced until after the demise of said prosecuting attorney. The state introduced evidence that deceased had no weapon at the time of the homicide.

Therefore, respondent contends there is no merit to the contention that the prosecuting attorney knowingly suppressed evidence and that said petitioner was deprived of any constitutional rights.

III.

The state did not knowingly introduce any perjured testimony.

The so-called perjured testimony alleged to be known to be perjured by the prosecuting attorney, referred to in said petition for Writ of Certiorari, apparently has reference to the testimony of Albert "Cotton" Jones at the trial to the denial that he saw deceased draw a knife on the petitioner or that he say any knife or weapon in the deceased's hands.

Three affidavits were made by this witness subsequent to testifying at the original trial. The first affidavit was filed with the petitioner's application for Writ of Habeas

Corpus wherein said witness stated that he was instructed by the prosecuting attorney as to what his testimony would be and that he was compelled to so testify as a result of the use of high pressure, coercion and threats by said prosecuting attorney and was testifying under duress. He did not testify at the main Habeas Corpus hearing, but at said trial his second affidavit was introduced restating the contents of one affidavit hereinabove referred to and in addition thereto stated that if he had not been under duress he would have testified that the defendant was compelled to shoot Van Ross to protect himself. That defendant shot at least twice in the floor to endeavor to stop Van Ross. That when he was asked the question, did Van Ross at any time or any other time have any weapon in his hands, he answered he did not see any, he was of that opinion because of the statement of Bert Lacey and Julia Hollins who were in better position to see that Willie Van Ross did have a knife.

During the pendency of a motion for rehearing in the Habeas Corpus proceeding in Cole County and on January 3, 1948, petitioner's attorney filed another affidavit of Albert "Cotton" Jones, which stated that he was intimidated, coerced and threatened by the prosecuting attorney and compelled to offer false and perjured testimony against said petitioner to the effect that the deceased did not have any such knife. That the prosecuting attorney would obtain an injunction against him and padlock the Harlem Club and file an information charging him with the commission of a felony of setting up improper conduct of said place and would cause the sheriff to arrest him, all of which caused him to present false and perjured evidence.

An affidavit of Gus Williams accompanied Jones' affidavit stating that he had heard what transpired between the prosecuting attorney and Jones. This is what the Supreme Court of Missouri had to say with regard to such

affidavits in **State v. Eaton**, Mo. Sup., 302 S. W. 2d 866, l. c. 871:

> "Both affiants, Jones and Williams, testified on the motion for rehearing in the habeas corpus case, the transcript of which is before us, from which it appears that the testimony of each represents, in substance and effect, a composite of their several affidavits. Their examinations were marked by contradictory and confusing answers in reply to highly leading and suggestive questions.
>
> "Gus Williams, when testifying before Judge Rooney, was a reluctant and uncertain witness. His memory was not at all good, and he would not undertake to recall what had transpired between himself and Jones, on the one hand, and the prosecutor, on the other, nor to what he had testified at the habeas corpus hearing. Instead, he was willing to stand on the latter testimony—whatever it may have been—because the facts were then fresher in his mind. But he did state that for several years before his death Albert 'Cotton' Jones had become so senile as to be incapacitated. As the perjury aspect of the case turns on 'Cotton's' veracity and the credence to be given his declarations, we deem it unnecessary to burden this opinion by stating the effect of other evidence produced by defendant which is not relevant to this question."

An interview between a state probation and parole officer and Jones was made and reduced to writing and introduced in evidence to which no objection was raised which, in sum and substance, is that Jones examined the affidavit prepared by his counsel, but was unable to understand it, and further disclaimed any knowledge of having admitted in the affidavit that he committed perjury at the original trial. The interview concluded with Jones' declaration that he would stand on both his statements, those given to the

petitioner and the subsequent conflicting one given to the prosecuting attorney.

The state further introduced other evidence of witness Strother, who witnessed the homicide and testified that he saw no weapon in the deceased's hand, and other evidence of investigation immediately following the homicide at which time inquiries were made of some seven or eight persons standing around, including Julia Hollins, as to how it all happened, and there was no mention whatsoever of the deceased having a knife.

We have no quarrel to pick with decisions holding the use of perjured testimony, known to be perjured by prosecuting authorities, constituted deprivation of rights guaranteed by the Constitution of the United States. However, respondent respectfully submits that no such perjured testimony was knowingly used by the prosecuting attorney in these proceedings, and neither was there any suppression of evidence. The petitioner failed to introduce any evidence showing wherein the prosecuting attorney deliberately suppressed any evidence.

Conclusion.

Wherefore, respondent respectfully submits that petitioner herein was not deprived of any rights under the laws and Constitution of Missouri and the United States, and said petition for Writ of Certiorari should be denied.

Respectfully submitted,

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